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No. 592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SHENANDOAH VALLEY BROADCASTING, INC., ET AL.,

Appellants,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, operators of 363 domestic television stations, appeal from the Judgment of the United States District Court for the Southern District of New York, entered on October 10, 1962, dismissing appellants' application under Section IX of the Amended Final Judgment herein for licenses to perform musical compositions in the repertory of the American Society of Composers, Authors and Publishers ("ASCAP" herein). Appellants submit this statement to show that the Supreme Court of the United

States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York, filed on September 14, 1962, is reported in CCH Trade Regulation Rep., para. 70,466. The amended opinion of the District Court is set out in the separate Appendix filed herewith, at pp. 1a-6a.

JURISDICTION

On February 26, 1941 the United States brought an action in the Southern District of New York against ASCAP under Section 4 of the Act of Congress of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 4 (the Sherman Act), charging violations of Section 1 of that Act (R. 2-20). On March 4, 1941, by consent of the parties, the District Court entered final judgment (R. 21-28). This judgment was superseded on March 14, 1950 by the Amended Final Judgment herein (set out at pp. 7a-24a of the Appendix), as further amended on and after January 7, 1960 (R. 43-75).

Section VI of the Judgment orders ASCAP "to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Appendix, p. 14a). Section IX(A) further orders ASCAP, upon receipt of a written application for a license for the right of public performance of ASCAP's repertory, to "advise the applicant in writing of

the fee which it deems reasonable for the license requested," and provides that in the event of disagreement the District Court for the Southern District of New York shall determine the reasonable fee for such license (Appendix, p. 17a).

On October 18, 1961, in anticipation of the expiration on December 31, 1961 of licenses then in effect between ASCAP and appellants, appellants applied to ASCAP pursuant to Sections VI and IX of the Judgment for a license to perform the ASCAP repertory during a five-year period beginning January 1, 1962. Under licenses expiring on December 31, 1961, each appellant had agreed in advance, for the period of that license, to purchase from ASCAP the right to perform its repertory in non-dramatic form on all programs except network and cooperative programs, as defined in the license. Appellants' application of October 18, 1961 sought a new license limited to programs produced by appellants themselves. ASCAP refused to issue the licenses applied for except on the condition that appellants also agree to obtain music rights for prerecorded (filmed and taped) programs furnished to appellants by independent film producers.

On December 19, 1961 appellants filed an application in the District Court under Section IX(A) of the Judgment for the determination of reasonable license fees for the new licenses requested from ASCAP (Appendix, pp. 25a-31a). Appellants' application was supported by the Government, which took the position that if the licenses requested were reasonable, the Court had the power to compel their issuance (Appendix, p. 2a). The Court held that it did not have

the power under the judgment to fix a fee for the type of licenses requested. Its order and judgment dismissing appellants' applications, dated and filed October 10, 1962, are set out in the Appendix at pp. 32a-36a. The notice of appeal to this Court was filed in the District Court on October 23, 1962 (R. 77-95).

The jurisdiction of this Court to review the order on direct appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. §29, and is sustained by the decisions of this Court in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502; *Hughes* v. *United States*, 342 U. S. 353; *United States* v. *California Co-operative Canneries*, 279 U. S. 553; *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683.

QUESTIONS PRESENTED

1. Did the District Court err in holding that the Amended Final Judgment permits ASCAP to insist that each appellant acquire music performance rights for programs produced by others in order to obtain such rights for programs produced by it?

2. Are appellants entitled under the Amended Final Judgment to the licenses requested by them and to have the District Court fix a reasonable fee therefor?

3. Did the District Court err in refusing to accept and consider evidence offered by appellants showing

(a) that the licenses applied for by appellants

(i) are reasonable and in accord with the normal and customary way of licensing music rights at the

time of the entry of the Amended Final Judgment and since that time;

(ii) are "blanket" and "per program" licenses as those terms are used in the Amended Final Judgment; and

(b) that the type of license offered by ASCAP

(i) perpetuates restraints on competition in the marketing of music rights that the Amended Final Judgment was designed to prevent, and

(ii) restricts and interferes with the right of its members separately to issue public performance licenses to broadcasters, contrary to the provisions of Section IV(B) of the Judgment?

4. Having expressly rejected the parties' respective offers of proof and purporting to reach a decision without making any findings of facts with respect thereto, did the District Court err in making factual findings that appellants' requested licenses are not "blanket" or "per program" licenses, within the meaning of the Amended Final Judgment, as revealed by television broadcasters' past dealings with ASCAP?

STATEMENT

The ASCAP Consent Decree

As originally entered on March 4, 1941 (R. 21-28), the consent judgment against ASCAP did not contain the compulsory licensing provisions of the present decree. It limited itself to enjoining ASCAP from engaging in certain practices in the licensing of its repertory.

The present compulsory licensing provisions were introduced into the decree following the decisions of the District Courts in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948) and *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948). In *Alden-Rochelle*, a private antitrust suit brought by a group of motion picture theatre operators against ASCAP, and in *M. Witmark*, a copyright infringement action by publisher-members of ASCAP against certain motion picture theatre operators, it was held that despite the 1941 decree ASCAP's operations continued to be in violation of Section 1 of the Sherman Act. The Courts found that ASCAP forced motion picture theatre exhibitors to take film performance licenses from ASCAP by means of various restrictive agreements which barred ASCAP members from licensing the performance rights directly to the film producers, and instead channeled such rights to ASCAP for licensing to the exhibitor. The means found by the Court to have been used to accomplish this result included (1) agreements between motion picture producers and composers under which the composer granted recording rights to the producer (i.e., the right to synchronize a copyrighted musical composition with the film), but expressly excepted the performing rights for joint transfer to ASCAP for licensing to the motion picture exhibitor (80 F. Supp. at 892); (2) film distribution agreements that limited the exhibition of films to theatres having an ASCAP license and prohibited the theatre operator from altering or deleting any part of the film (80 F. Supp. at 844-845, 892); and (3) ASCAP's membership rules which required all license fees obtained by ASCAP members separately to be paid to ASCAP and distributed to the

members according to a formula devised by ASCAP (80 F. Supp. at 846).

On March 14, 1950, following these decisions, the 1941 decree was vacated and the Amended Final Judgment entered, which introduced the compulsory licensing provisions of Section VI and IX, and Section IV(B). Section IV(B) enjoins ASCAP from "limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance" (Appendix, p. 10a). Other changes included an injunction against ASCAP's licensing motion picture exhibitors and provisions concerning membership in and management of ASCAP and the distribution of ASCAP fees to its members (Appendix, pp. 10a, 18a-21a). Some of these latter provisions were further amended on January 7, 1960 (see *Sam Fox Publishing Co. v. United States*, 366 U. S. 683, 686-687).

Appellants' License Application

On December 19, 1962, following unsuccessful negotiations with ASCAP, appellants ("petitioners" herein) applied to the District Court pursuant to Sections VI and IX of the Judgment herein for the determination of a reasonable fee on licenses to perform works in the ASCAP repertory for a five-year period commencing on January 1, 1962 (Appendix, pp. 25a-31a).

In their application petitioners requested the Court to fix fees on a license granting the right to perform the ASCAP repertory on programs produced by petitioners themselves. Expressly excluded from the requested license

were network program and prerecorded programs furnished to petitioners by independent film producers (Appendix, pp. 26a-27a).

The precise terms of the licenses requested and petitioners' grounds for seeking that type of license were more fully set out in letters to ASCAP, dated October 18 and November 29, 1961, annexed to petitioners' application (R. 127-136), and in a written offer of proof submitted by petitioners to the Court on April 17, 1962 (Appendix, pp. 37a-175a).

In their offer of proof petitioners pointed out that local television stations have three principal program sources:

> (1) Programs produced by the broadcasters themselves.
>
> (2) Programs furnished to broadcasters by the three national television networks. Television stations with network affiliation devote on the average approximately 62% of their total broadcasting time to the transmission of network programs.
>
> (3) Prerecorded program material furnished to broadcasters by independent film producers. This material consists in large part of theatrical motion picture films, which are offered to television broadcasters after initial exhibition in motion picture theatres, and so-called television "film series." At the present time nearly 68% of local (non-network) programs consist of prerecorded program material, access to which is essential for the successful operation of a commercial television station (Appendix, pp. 39a-41a).

Petitioners' requested licenses, like their existing licenses, would exclude network programs from their cover-

age. Unlike existing licenses, petitioners' requested licenses would also exclude prerecorded programs produced by independent film producers after the date fixed by the Court as the starting date of the new licenses (Appendix, p. 42a).

Petitioners offered to prove that ASCAP refused to issue the licenses requested by petitioners, and insisted upon a renewal of the existing type of license, in order to maintain the prevailing practice of splitting the music "recording" rights (the right to incorporate the score of a copyrighted musical selection into a film or tape) from the television performance rights (Appendix, pp. 63a-64a), so that the recording rights are licensed directly by publishers and composers to film producers, but the television performance right are channeled to ASCAP for licensing by it to broadcasters (Appendix, pp. 53a-54a). Petitioners also submitted proof that ASCAP's existing television licenses are part of a network of restrictive agreements worked out by ASCAP and some of its publisher and composer members to prevent ASCAP composers and publishers from granting television performance rights to film producers simultaneously with recording rights, so that ASCAP would be assured of acquiring them for licensing to broadcasters (Appendix, pp. 55a-63a). These arrangements recently culminated in the execution in 1969 of an agreement between the major film producers and the Composers and Lyricists Guild of America, most of whose members and officers belong to ASCAP, under which each film producer and composer agrees to split the music recording rights from the television performance rights, and to assign the television performance rights to ASCAP (or any

other licensing organization selected by the parties) for licensing to television broadcasters (Appendix, pp. 61a-62a). The intended effect of this, and like, agreements, petitioners offered to show, is to force broadcasters to agree in advance to purchase from ASCAP the performance rights in prerecorded material (Appendix, pp. 63a-64a), and thereby to maintain the license fees paid for such music at a uniform, non-competitive level, instead of permitting the price to be set through bargaining by the film producer, or the broadcaster, with publishers and composers (Appendix, pp. 46a-51a).

These restrictive agreements are implemented by ASCAP's existing "blanket" licenses, which allow broadcasters no credit for rights purchased by the producer from an ASCAP member individually (Appendix, p. 63a).*

As a result of these arrangements, petitioners offered to prove, there has been no instance since the adoption of the existing type of license of a film producer's having acquired television performance rights at the source (Appendix, p. 55a), even though such rights probably could be acquired by the producer at a price much lower than the fees paid by broadcasters (Appendix, pp. 46a-51a). As long as broadcasters are required under existing licenses to agree in advance to buy such rights from ASCAP, producers

* Paragraph 5(H) of ASCAP's "blanket" license provides that:

> "No payment shall be required hereunder with respect to a local commercial television program of LICENSEE presented by motion picture or by transcription if a license has been granted by SOCIETY *(as distinguished from its members)* at the source to perform on such local commercial television program by means of such motion picture or such transcription, as the case may be, the musical compositions embodied therein." (Italics added)

have no incentive to acquire them at the source. Instead, film producers share in the license fees collected by ASCAP under its television licenses through affiliated companies set up by producers to collect the 50% "publisher's" share of ASCAP revenues (Appendix, pp. 54a, 55a-58a).

By excluding prerecorded programs produced after the commencement of the new licenses, the licenses requested by petitioners would lead publishers and composers to negotiate, individually or through ASCAP, with film producers, or broadcasters, for the licensing of performance rights in prerecorded programs (Appendix, p. 64a).

Petitioners further offered proof that the type of license requested by petitioners conforms to the normal and customary way of licensing copyrighted material (excepting only television performance rights) for use in prerecorded programs (Appendix, pp. 44a-46a); that the requested licenses would result in publishers' and composers' receiving payment for copyrighted music commensurate with the great differences in the quality and quantity of such music used in different films (Appendix, pp. 46a-49a); that the requested licenses are reasonable and present no undue difficulties of administration and operation (Appendix, pp. 64a-66a); and that the requested licenses are "blanket" and "per program" licenses as those terms are used in the Judgment herein (Appendix, pp. 66a-68a).

The Dismissal of Petitioners' Application

On September 14, 1962, without having held a hearing for the taking of evidence on petitioners' application and without having considered petitioners' offer of proof (Ap-

pendix, p. 33a), the District Court filed an opinion in which the Court held that it did not have the power under the Amended Final Judgment to entertain petitioners' application because "the type of license sought is neither the blanket nor per program license described in the judgment" (Appendix, p. 1a). The District Court gave petitioners ten days in which to elect to proceed on their petition as one filed for the fixation of fees on a renewal of the existing type of license (Appendix, p. 6a). When no such election was made, the District Court entered an order and judgment dismissing petitioners' application (Appendix, pp. 32a-35a).

The Questions Are Substantial

This appeal presents important and substantial questions relating to the construction of an antitrust consent judgment. The decision of the District Court is the first definitive construction of the compulsory licensing provisions of the Amended Final Judgment herein, which are similar to those found in other Sherman Act decrees. It affects the rights and interests not only of the television broadcasting industry, which pays about $19,000,000 a year to ASCAP for the right to perform its repertory (Appendix, p. 38a), but of all present and prospective commercial users of music who must deal with ASCAP, which is the largest music performance rights licensing organization in the United States. The interpretation given to the provisions of the Judgment will have a significant effect upon the vitality of competition in the marketing of music performance rights in the United States.

1. The District Court's decision, holding that ASCAP may force appellants to take a license covering prerecorded programs produced by others in order to obtain the right to play ASCAP compositions on programs produced by appellants themselves, is contrary to the plain intendment of Sections IV(B), VI and IX of the Judgment herein. The purpose of these sections is to give the user, and not ASCAP, the right to designate the class of programs to be covered by the licenses requested, and to make it impossible for ASCAP to engage in "block-booking" or any other practice that has the effect of limiting or restricting the right of ASCAP members (under Section IV(B)) to deal directly with the user.

Section VI of the Judgment provides that "ASCAP is hereby ordered and directed to grant *to any user making written application therefor* a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Appendix, p. 14a). Appellants, who are music "users," made "written application" to ASCAP on October 18, 1961, for "a non-exclusive license to perform all of the compositions in the ASCAP repertory." Section IX(A) provides that "ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable *for the license requested.*" (Appendix, pp. 16a-17a) and further, that pending the determination of rate proceedings the applicant shall have the right to use any, some or all of the ASCAP compositions "*to which its application pertains*" (Appendix, p. 17a).

The clear purpose of these provisions—to give the music user, not ASCAP, the right to designate the license requested—is confirmed by the history of their adoption, recourse to which may be made in construing the ASCAP consent decree. *Swift & Co.* v. *United States*, 276 U. S. 311 at p. 328; *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 931 (2d Cir.), certiorari denied, 333 U. S. 873; *United States* v. *Paramount Pictures, Inc.*, 165 F. Supp. 643, 644 (S. D. N. Y.), appeal dismissed, 358 U. S. 28. When the Amended Final Judgment was entered in 1950, the illegality under the antitrust laws of "block-booking" of copyrighted material had recently been settled by this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948), in which this Court held (at pp. 156-159) that it is *per se* unlawful for motion picture distributors to engage in the "block-booking" of copyrighted films by offering to license particular films to exhibitors only on the condition that the exhibitors also take a license for an additional group of films. In *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948), and *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), the District Courts relied heavily on the *Paramount* decision in finding that, despite the 1941 consent decree, ASCAP's licensing practices still violated the Sherman Act (80 F. Supp. at 848, 894-895). The courts condemned various restrictive arrangements which inhibited ASCAP members from granting performance rights to film producers simultaneously with the film recording rights, thereby forcing film exhibitors to take performance licenses from ASCAP covering all films (80 F. Supp. at 892-895). Following these decisions, and in consequence of them, the 1941 decree was vacated and the Amended Final Judgment entered, which introduced into the decree

the compulsory licensing provisions of Section VI and IX. Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 Law & Contemp. Probs. 294, 301 (1954). The holding of the District Court that under the Judgment ASCAP may refuse to grant a license covering programs produced by petitioners themselves unless petitioners also acquire rights for programs produced by independent film producers, without any showing that the licenses requested by petitioners are unreasonable or unworkable, cannot be reconciled either with the language or the history of the compulsory licensing provisions of the Judgment.

The result of the District Court's decision is to permit ASCAP to engage in practices that the courts have repeatedly enjoined as *per se* unlawful under the Sherman Act, a recent instance being afforded by *United States* v. *Loew's, Inc.* (U. S. Sup. Ct., November 5, 1962), where this Court approved so much of the District Court's final order as enjoined defendants from conditioning the licensing of any film to a television station on the licensing of the same, or any other, film to any other television station.

2. Furthermore, the District Court erred in rejecting petitioners' requested license, and dismissing petitioners' application on petitioners' refusal to renew the existing type of license, without considering or holding a hearing on the proof offered by petitioners that ASCAP's existing licenses are unreasonable and do not comply with the provisions of Sections IV(B), VI and IX of the Amended Final Judgment.

The facts adduced by petitioners in their offer of proof demonstrate that by refusing to issue that type of license requested by petitioners, and insisting on a renewal of

the existing type of license, ASCAP is in violation of Section IV(B) of the Judgment, which enjoins ASCAP from "limiting, restricting or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance" (Appendix, p. 10a). Petitioners furnished to the Court detailed and fully documented proof that ASCAP's existing television licenses are part of a network of restrictive agreements worked out by ASCAP and its leading publishers and composers to prevent ASCAP members from granting television performance rights to film producers at the same time that they grant music recording licenses, so as to maintain the prevailing practice of splitting the music recording rights from television performance rights in prerecorded program material, and channeling the latter rights to ASCAP for licensing to stations by ASCAP (Appendix, pp. 55a-63a). These agreements are implemented by ASCAP's existing network and local station "blanket" licenses, which require broadcasters to pay a fee on all prerecorded programs and allow the licensee a credit for programs as to which the producer has already obtained the performance rights only if such rights were obtained by the producer from ASCAP itself and not from an ASCAP member individually (Appendix, p. 63a). By reason of these restrictive arrangements, ASCAP's broadcaster licensees have at no time received a credit under the existing licenses for music cleared at the source on prerecorded programs (Appendix, p. 55a).

The restrictive practices which ASCAP is endeavoring to preserve through its insistence upon a renewal of the existing type of license are precisely the kind of practices that Section IV(B) was meant to avoid. Section IV(B)

was adopted in 1950 following the decisions of the New York and Minnesota District Courts in *Alden-Rochelle*, 80 F. Supp. 888 (S.D. N.Y. 1948), and *M. Witmark*, 80 F. Supp. 843 (D. Minn. 1948) in which various restrictive arrangements between film producers, their ASCAP music publishing affiliates, and composers, in many respects identical with the agreements set forth in petitioners' offer of proof (compare 80 F. Supp. at pp. 892-895 with Appendix, pp. 55a-63a), were condemned on the ground that they inhibited ASCAP members from granting exhibition rights to film producers simultaneously with recording rights, thereby forcing film exhibitors to take out performance licenses from ASCAP.

While in these cases the courts were concerned with the licensing of theatrical motion picture performance rights, not television performance rights, this distinction is not material under Section IV(B). The injunctive provisions of Section IV(B), unlike certain other prohibitions in the 1950 Amended Final Judgment, are not confined to restraints involving theatrical motion picture films but are directed against any limitations or restrictions affecting the right of an ASCAP member to issue performance licenses.

Petitioners' proof shows that by requiring broadcasters to agree in advance to buy all performance rights from it, ASCAP deprives broadcasters of the lower music costs that would result if ASCAP members were free to negotiate directly with the film producers for assignment of television performance licenses simultaneously with the recording and performance rights (Appendix, pp. 46a-51a). In such event composers and publishers, as well as ASCAP, would con-

pete in the furnishing of such rights to producers, many of whom would clear them at the source.

A consent decree, like any other judgment, must be construed so as to give meaning and effect to all of its provisions. *Swift & Co.* v. *United States*, 276 U. S. 311, 328 (1928). If, as petitioners' proof shows, ASCAP violated Section IV(B) by insisting on a renewal of the existing type of license, it seems plain that the District Court erred in ruling that the existing type of license is the only type that ASCAP is obligated to offer to petitioners under the Judgment. On the contrary, the restrictive effect of ASCAP's improper activities, and of the various restrictive arrangements of which the existing licenses are an integral part, can be avoided only through the type of license requested by petitioners, which would exclude prerecorded programs produced after the starting date of the new licenses.

3. The District Court erred in ruling that "the type of license sought is neither the blanket nor per program license described in the judgment" (Appendix, p. 1a). These terms are used in Section VII to describe two alternative methods of computing the fees to be paid by an applicant to ASCAP for a license.* They have nothing to do with

* As the District Court recognized, Section VII "deals primarily with the computation of fees for radio and television broadcasting" (Appendix, p. 5a). Section VII is derived from paragraph II(3) of the 1941 decree, which makes specific provision for "a per program basis of compensation," and requires ASCAP to establish a fair relationship between such "per program basis" and "a basis of compensation which shall not vary in direct proportion either to actual performances during the term of the license of the musical compositions licensed by said defendant for performance or to the number of programs on which musical compositions licensed by defendant shall be performed" (R. 24). The stated purpose of paragraph II(3) was "to afford radio broadcasters alternative basis of license compensation" (R. 25).

the scope of the licenses to be issued by ASCAP. Under Section VII, a "blanket" license is one that requires a broadcaster to pay a fee based on revenues from the entire group of programs covered by the license, including those within the licensed group that use no ASCAP music at all (Appendix, p. 15a). A "per program" license, on the other hand, provides for a license fee based on a fixed amount or percentage of income from each program that actually uses ASCAP music within the license group (Appendix, p. 15a). Section VII (A) of the Judgment prohibits ASCAP from imposing the "blanket" fee basis without the broadcaster's consent, whereas Section VII(B) gives ASCAP the option of charging either a flat fee or a percentage of the broadcaster's income from those licensed programs that play ASCAP music.

Nothing in Section VII restricts the right of a broadcaster to apply for licenses limited to a specific class of programs which constitute less than all of the broadcaster's programming time or material. The broadcaster's right to choose the program group for which he desires a license from ASCAP is no different than the right of any other type of "user," such as a theatre, an orchestra, or a hotel chain, to select the period of time, and the geographical area, to be covered by its license from ASCAP.

The District Court's interpretation of the terms "blanket" and "per program" as used in Section VII is contradicted by the terms of ASCAP's existing television licenses themselves. ASCAP's existing form of "blanket" license does not grant the right to perform the ASCAP repertory on all of petitioners' programs; the license expressly excludes from its coverage network and cooperative programs, as well as dramatic performances of its repertory,

as defined therein (Appendix, p. 67a), with the result that, in the case of the many stations having network affiliation, the license in fact covers only a portion of the station's programming (Appendix, p. 40a). It is a "blanket" license only in the sense that the fee payable to ASCAP is computed on the basis of all programs falling within the program group covered by the license, whether or not they use ASCAP music.

The same is true of ASCAP's existing "per program" license. Whereas Section VII(B) of the Judgment provides that the fee for a "per program" license shall at the option of ASCAP be either a specified amount or a percentage of the sum paid by the sponsor "for each program in which compositions in the ASCAP repertory shall be performed," ASCAP's existing form of "per program" license, which expressly excludes network and cooperative programs, as well as dramatic performances of its repertory, does not require payment of a fee for each program using ASCAP music (Appendix, p. 67a). It is a "per program" license only in the sense that a fee must be paid on all programs within the program group covered by the license.

The licenses requested by petitioners, like the existing licenses, are "blanket" licenses as defined in Section VII since the license fee to be paid to ASCAP will be based on the income from all programs within the licensed group, regardless of the fact that some programs would not use any ASCAP music. In the alternative, petitioners seek a "per program" license as defined in Section VII, whereby they would pay a fee based on income from those programs within the licensed group that actually use ASCAP music

(Appendix, p. 26a, par. 4). The District Court was wrong in concluding that petitioners' requested "blanket" and "per program" licenses do not comply with Section VII.

4. The District Court further erred in adopting as factual findings (Appendix, p. 3a) made in support of its construction of Section VII of the Judgment a large portion of the averments contained in ASCAP's offer of proof (R. 1662-1664) despite the fact that the Court held no hearings for the taking of evidence and had formally rejected both petitioners' and ASCAP's respective offers of proof in reaching its decision (Appendix, p. 33a).

Following oral argument as to the Court's authority to entertain petitioners' application, petitioners and ASCAP simultaneously submitted written offers of proof (Appendix, p. 33a). It was understood that the simultaneous submission of these offers in no way constituted an admission by one party of the accuracy of assertions made in the other's offer, and, in fact, petitioners' offer expressly reserved the right to offer additional proof in support of petitioners' application "or in rebuttal to evidence offered in opposition thereto" (Appendix, p. 37a). No hearings were ever held on these offers of proof, or for the purpose of taking evidence. In its order dismissing petitioners' application, the District Court expressly confirmed that the Court reached its decision "without having considered the offers of proof submitted by the parties and without making any findings of fact with respect thereto" (Appendix, p. 33a). Nevertheless, in its opinion, the District Court went on to make findings with respect to the parties'

past dealings both before and after the entry of the 1950 Amended Final Judgment, largely adopting portions of ASCAP's offer of proof (R. 1032-1034), and drew the conclusion that petitioners' requested licenses are not "blanket" or "per program" licenses within the meaning of the Judgment.

The fact that in the past broadcasters agreed to take the type of license offered by ASCAP would seem to have little, if any, bearing on the question of the petitioners' rights under the Judgment to seek licenses which differ from those heretofore offered by ASCAP, particularly in light of the fact that pre-recorded programs of the type involved here did not become a material factor until recent years (Appendix, pp. 43a-44a). No showing was made that ASCAP and the Government had reference to any particular form of television license in negotiating the 1950 decree, and the Government, in the present proceedings, has expressly repudiated ASCAP's contentions as to the meaning of the compulsory licensing provisions of the decree (Appendix, p. 2a). However, if, as the District Court held, petitioners are to be precluded from seeking the licenses requested by them by reason of their alleged past dealings with ASCAP, a hearing should have been held for the submission and consideration by the Court of all pertinent evidence. The summary manner in which the District Court sought to dispose of this issue was erroneous.

Conclusion

We submit that the District Court committed serious error in dismissing petitioners' application for a license under the compulsory licensing provisions of the Amended Final Judgment and in refusing to grant petitioners a hearing *for* the taking of evidence. We believe that the questions presented by this appeal are substantial and that they are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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